Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-598 OF 1997

DENIS ONG, MOHD SAARI AND ALAUDDIN JJCA

26 DECEMBER 2001

Civil Procedure *— Amendment — Statement of claim — Amendment to include second guarantee — Whether plaintiff entitled to amend statement of claim contrary to election and representation — Whether plaintiff made election and representation*

Civil Procedure *— Appeal — New point raised on appeal — Amendment to statement of claim to include second guarantee, whether contrary to election and representation — Exceptions to allow new points to be raised at appeal stage — Whether point of law raised question of jurisdiction or would result in rectification of erroneous order*

The defendant had signed two guarantees ('first and second guarantees') in favour of the plaintiff. The plaintiff applied to amend its statement of claim to include the second guarantee. The application was allowed by the senior assistant registrar ('the SAR'). The defendant then appealed to the judge in chambers but the appeal was dismissed. Hence the instant appeal by the defendant. The only issue raised by the defendant's counsel in this appeal was whether the plaintiff was entitled to amend its statement of claim contrary to the election and representation made to court on 12 June 1997 to the effect that the plaintiff's claim was based only on the first guarantee and not the second guarantee.

Held, dismissing the appeal:

(1) The issue of election and representation raised in this appeal was never canvassed before the SAR nor the learned judge. The present case did not come under any of the established exceptions laid down in *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamed Saheed & Ors* [1989] 2 MLJ 416, namely, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction or it would result in the rectification of an erroneous order (see p 143E–F).

(2) As such, this was not an appropriate case to allow the defendant's counsel to argue a new line of defence. Based on this reason alone, the appeal could not succeed (see p 143H–I).

(3) In the reasons given by the plaintiff for the amendment to the statement of claim, it was clear that what the plaintiff meant was that it was prepared to rely on the first guarantee if the hearing were not postponed on that day. There was no indication that the plaintiff would abandon its claim under the second guarantee. However, since the hearing was postponed to enable the defendant to amend his defence, the plaintiff could not be said

to have elected to proceed on the first guarantee only and abandoned its right to amend the statement of claim so as to include the second guarantee. The amendment to the statement of claim merely sought to clarify that the plaintiff was in fact relying on the first and second guarantees and to cure the ambiguity that only the first guarantee was being relied upon (see pp 144G–H, 145A–B).

[Bahasa Malaysia summary

Defendan telah menandatangani dua gerenti ('gerenti-gerenti pertama dan kedua') yang menyebelahi plaintif. Plaintif telah memohon untuk membuat pindaan kepada pernyataan tuntutan bagi memasukkan gerenti kedua. Permohonan tersebut telah dibenarkan oleh penolong kanan pendaftar ('PKP'). Defendan kemudian telah membuat rayuan kepada hakim dalam kamar tetapi rayuan tersebut telah ditolak. Justeru itu rayuan sekarang ini dibuat oleh defendan. Satu-satunya persoalan yang ditimbulkan oleh peguam defendan dalam rayuan ini adalah sama ada plaintif berhak untuk membuat pindaan kepada pernyataan tuntutannya yang bertentangan dengan pemilihan dan representasi yang dibuat kepada mahkamah pada 12 Jun 1997 yang mengakibatkan tuntutan plaintif didasarkan hanya atas gerenti pertama dan bukan gerenti kedua.

Diputuskan, menolak rayuan tersebut:

(1) Persoalan pemilihan dan representasi yang ditimbulkan dalam rayuan ini tidak pernah dirayukan di hadapan PKP maupun hakim yang arif. Kes sekarang ini tidak jatuh di bawah pengecualian yang sudah mapan dalam *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamed Saheed & Ors* [1989] 2 MLJ 416, khususnya, di mana satu perkara dari segi undang-undang boleh dibicarakan untuk kali pertama di peringkat rayuan jika ia menimbulkan satu persoalan tentang bidang kuasa atau ia akan mengakibatkan pembetulan satu perintah yang salah (lihat ms 143E–F).

(2) Oleh itu, ini bukan satu kes yang sesuai untuk membenarkan peguam defendan menghujahkan satu perkara baru untuk pembelaan. Berdasarkan sebab ini sahaja, rayuan tersebut tidak boleh berjaya (lihat ms 143H–I).

(3) Daripada sebab-sebab yang diberikan oleh plaintif untuk membuat pindaan kepada pernyataan tuntutan, adalah jelas bahawa apa yang plaintif maksudkan adalah ia bersedia untuk bergantung kepada gerenti pertama jika perbicaraan tersebut tidak ditangguhkan pada hari tersebut. Tiada tanda yang plaintif akan melepaskan tuntutannya di bawah gerenti kedua. Namun begitu, memandangkan perbicaraan tersebut telah ditangguhkan untuk membolehkan defendan membuat pindaan kepada

pembelaan beliau, plaintif tidak boleh dikatakan telah memilih untuk meneruskan atas gerenti pertama sahaja dan melepaskan haknya untuk meminda pernyataan tuntutan bagi memasukkan gerenti kedua. Pindaan kepada pernyataan tuntutan hanya menjelaskan bahawa plaintif pada hakikatnya bergantung kepada gerenti-gerenti pertama dan kedua dan untuk memulihkan kekaburan di mana plaintif hanya boleh bergantung kepada gerenti pertama sahaja (lihat ms 144G–H, 145A–B).]

[*Editorial Note*: The appellant has filed an application for leave to appeal to the Federal Court vide Civil Application No 08-58-2001(W) .]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 478–488.

For a case on new points raised on appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 980.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (refd)

Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors [1989] 2 MLJ 416 (folld)

Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

Appeal from: Civil Suit No D5–22–1575 of 1992 (High Court, Kuala Lumpur)

Saranjit Singh (*Vasdev Bakshani & Associates*) for the appellant.
Chang Wei Mun (*Raja Darryl & Loh*) for the respondent.

Alauddin JCA (delivering judgment of the court): By way of a summons in chambers (encl 140) dated 2 July 1997, the respondent, who was the plantiff in the court below, applied to amend its statement of claim. The application was supported by the affidavit of Ong Boon Chak sworn on 28 June 1997 (encl 141). The application was first heard by the learned senior assistant registrar who allowed the application on 5 August 1997. The appellant then appealed against that decision to the judge in chambers who dismissed the appeal on 15 September 1997. Hence, the present appeal before us.

To put it in proper perspective, the matter was originally fixed for full trial before the learned judge on 12 to 17 June 1997. On the first day of trial, ie 12 June 1997, the appellant (defendant 3) applied for an adjournment so as to amend his defence. The appellant came to the trial with a proposed draft amended defence for the court's perusal. The respondent objected to the adjournment. The learned judge however, allowed the adjournment and ordered costs to be paid to the respondent. A B

On 2 July 1997, the respondent filed its application to amend its statement of claim. On 30 July 1997, the appellant filed his application to amend his defence in line with the draft amended defence which was given to the court on 12 June 1997.

On 5 August 1997, the respondent's application to amend the statement of claim was allowed by the senior assistant registrar. The appellant appealed against this order. On 15 September 1997, the appellant's appeal was dismissed by the learned judge. On 9 October 1997, he filed his appeal to the Court of Appeal against the judge's order dated 15 September 1997. On 25 September 1992, the appellant's application to amend his defence came up for mention. The appellant took the stand that as the respondent has been given leave to amend, the amendment to his defence would be as of right, and therefore there would be no necessity for him to proceed with his application for leave to amend. C D

On 13 October 1997, the sealed amended statement of claim was served on the appellant's solicitors. On 22 October 1992, the appellant served his amended defence on the respondent's solicitors but reserved his right to proceed with his appeal to the Court of Appeal. The terms of the amended defence was identical to that stated in the appellant's application for leave to amend. Under the circumstances, on 25 May 1998, the appellant withdrew his application to amend his defence. E F

Before us, learned counsel for the appellant raised only one issue, ie whether the respondent is entitled to amend its statement of claim contrary to the election and representation made to court on 12 June 1997 to the effect that the respondent's claim was based only on the first guarantee and not the second guarantee.

It was further argued by learned counsel that the respondent by their very conduct, as evidenced by the notes of evidence (see pp 165–167 of the appeal record), is clearly barred by the doctrine of election and estoppel from amending the statement of claim to include the second guarantee. G

Further, learned counsel submitted that implicit in their representation to court on 12 June 1997, the respondent effectively abandoned their rights on the second guarantee. This was to a certain extent reiterated by the respondent in their affidavit (see p 177 of the appeal record para 7). Relying on the respondent's election and representation, the appellant filed his application to amend the defence but not before the respondent acted inconsistently with their representation made to the court on 12 June 1997. The respondent is therefore not entitled to approbate and reprobate nor 'blow hot and cold' on this issue. Counsel added that the amendment H I

A sought by the respondent had prejudiced the appellant, a prejudice that cannot be compensated with costs.

In support of his submission, learned counsel cited the following cases:

B (i) *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7;

(ii) *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283;

(iii) *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565;

C (iv) *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49.

We feel compelled to mention at this stage that from the very outset of his submission, learned counsel for the appellant informed this court that he was not challenging nor complaining about the principles involved in an application for amendment of pleadings as set out in *Yamaha Motor*. In D other words, learned counsel conceded that both the senior assistant registrar and the learned judge in deciding the application by the respondent had proceeded on the correct principles. However, the main thrust of his complaint is grounded on the issue of election and estoppel as mentioned earlier.

E It must also be emphasized that this issue raised by learned counsel was never canvassed before the SAR nor the learned judge. It is being raised now for the first time. It was never introduced nor argued in the courts below. Can learned counsel be permitted to do this?

In *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed* F *& Ors* [1989] 2 CLJ 577, the Supreme Court held that as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below. However this rule is subject to certain exceptions. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, the Court of Appeal would entertain a point of law not raised in the court below if it would result G in the rectification of an erroneous order (see also *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9).

Relying on the above authority we must say, with the greatest of respect to learned counsel, that the present case does not come under any of the established exceptions. The new point raised is not one of jurisdiction or illegality. It is also not a mere omission which could be termed a H technicality. The so called 'omission' is in fact a new line of defence altogether. The new defence based on election and equitable estoppel was never pleaded or argued in the courts below.

For reasons stated, we do not think this is an appropriate case where we should allow learned counsel for the appellant to argue a new line of I defence. Based on this reason alone we say that this appeal cannot succeed. However, should our decision be found to be erroneous, we would proceed to consider the merits of the issue raised.

Is there election and is the plantiff estopped from amending its statement of claim?

It was contended by learned counsel for the appellant that learned counsel for the respondent had represented to them that he was only relying on the first guarantee when they appeared before the learned judge on the first day of hearing. He then referred to pp 165–167 of the appeal record wherein the following record was made by the learned judge:

> En Chang:
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> Arahan saya adalah untuk membantah permohonan ini.
>
> Alasan —
>
> (1) Bukanlah rahsia bahawa plaintif akan bergantung kepada gerenti yang pertama. Malah ini telah dikatakan semenjak tahun 1992. Pindaan ini patut dibuat lebih awal lagi.
>
> (2) Plaintif telah bersiap sedia untuk perbicaraan pada hari ini. Dalam pada ini, dua sapina telahpun diserahkan dan salah seorang daripada saksi adalah CEO kepada suatu bank commercial.
>
> Penyata-penyata saksi telahpun sedia dan telah diserahkan dan apa-apa pindaan akan membawa akibat kepada pernyataan-pernyataan itu nanti.
>
> Akhir sekali, kos tidak akan dapat mempampaskan plaintiff kerana defenden (3) telah diisytiharkan bankrap di Singapura.

The reasons given for the amendment as stated in the respondent's supporting affidavit at p 177 of the appeal record read as follows:

> (7) Walaupun sebenarnya plaintiff berhasrat bergantung kepada gerenti-gerenti bertarikh 18 Oktober 1990 dan juga 15 April 1992 terhadap defendan ketiga, plaintiff sanggup bergantung sahaja kepada gerenti bertarikh 18 Oktober 1990 jikalau perbicaraan penuh dapat berjalan seperti yang dijadualkan.
>
> (8) Oleh kerana perbicaraan telah pun ditangguhkan, maka plaintif hendak meminda pernyataan tuntutannya supaya bergantung kepada gerenti-gerenti bertarikh 18 Oktober 1990 dan juga 15 April 1992. Sesalinan gerenti-gerenti dilampirkan di sini bertanda 'OBC– 1'.

From the above paragraphs, it is clear to us that what the respondent meant was that they were prepared to rely only on the first guarantee if the hearing was not postponed on that day. There was no indication whatsoever that they would abandon the second guarantee. They were ready to proceed with the trial on 12 June 1997 but since the adjournment was ultimately allowed for the purpose of enabling the appellant to amend his defence, can the respondent now be said to have elected to proceed on the first guarantee only and abandoned its right to amend the statement of claim so as to include the second guarantee? We do not think so. To our minds the reasons given by the respondent in the affidavit have explained what had actually transpired before the learned judge. There is no doubt that they are consistent with the record made by the learned judge at p 177 of the appeal record.

A The appellant who was sued as a guarantor had signed both guarantees (see pp 191–198 of the appeal record). In his amended defence, the amended parts pleaded defences in respect of both guarantees (see p 135 para 8 and p 136 paras 8B and 10 of the appeal record). In our view, the amendment to the statement of claim seeks merely to clarify that the respondent was in fact relying on both guarantees (see p 115 para 13 of the B appeal record) and to cure the ambiguity that only the first guarantee was being relied upon. The appellant is now in no position to allege that it is unfair, unjust or unconscionable on the part of the respondent to amend its claim so as to clarify its position that it is relying on both guarantees, especially so since the appellant has in fact taken steps to plead his defences C in respect of both guarantees.

Touching upon the doctrine of estoppel, the learned Gopal Sri Ram JCA in his judgment in *Lai Yoke Ngan*, had this to say at p 583:

> The doctrine of estoppel is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. The global D question which a court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.

E Based on the above and taking into consideration the totality of the facts and circumstances of this appeal, we are of the view that the respondent should succeed. Hence we say that the doctrine of election and estoppel has no place in this appeal.

For reasons already stated, the appeal is dismissed with costs both here and in the courts below. The deposit is to be paid to the respondents to F account of taxed costs.

My learned brothers Denis Ong and Mohd Saari JJCA who had the opportunity of reading this judgment in draft, had expressed their concurrence with this judgment.

G *Appeal dismissed.*

Reported by Lim Lee Na

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